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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1446

MARK A. COLE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
FIRST APPELLATE DISTRICT,
HAMILTON COUNTY, OHIO**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. _____

MARK A. COLE,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Hamilton County Court of Appeals for the First Appellate District entered on October 25, 1976, which affirmed the Opinion and Order of the Hamilton County Court of Common Pleas entered August 10, 1976.

OPINIONS BELOW

The decision of the Court of Appeals is contained in its entry of dismissal dated October 25, 1976. It is unreported and reproduced in Appendix B. The Ohio Supreme Court refused sua sponte to exercise its jurisdiction reproduced in Appendix C.

JURISDICTION

The decision of the Court of Appeals was entered on October 25, 1976 from which a timely appeal was taken to the Ohio Supreme Court. The Ohio Supreme Court sua sponte dismissed the appeal, overruled the motion to certify the record from the Court of Appeals, thus, declining to exercise its jurisdiction over the case appendix D.

Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is an order of the trial court, denying the application of a defendant indicted for a felony, to take a deposition of material out-of-state witnesses, an appealable "final order" and denial of compulsory process?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution — Sixth Amendment —

"... In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ..."

Ohio Constitution — Section 10 — Article I —

"... In any trial, in any court, the party accused should be allowed to appear and defend in person and with counsel; ... to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf ...: but provision may be made by law for the taking of depositions by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court ..."
(emphasis added)

Ohio Revised Code § 2945.50

"At any time after an issue of fact is joined upon an indictment, ... the defendant may apply in writing to the court in which such indictment, ... is pending for a commission to take the deposition of any witness. The court or a judge thereof may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecution ... , before such witness shall be examined."

Ohio Revised Code § 2945.53

"In all cases in which depositions are taken by the ... accused, to be used by ... the accused, as provided in §§ 2945.50 to 2945.52, inclusive of the Revised Code, the court shall by proper order provide and secure to the accused the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face, as fully and in the same manner as if in court. ..."

STATEMENT OF THE CASE

The Petition for Certiorari is prosecuted from the judgment of the trial court which was affirmed by the Court of Appeals, First Appellate District. The Ohio Supreme Court denied jurisdiction.

This is a criminal felony case in which Petitioner appealed from the order of the trial court denying Petitioner's Application To Take Deposition of Material Out-of-State Witnesses. Petitioner appealed to the First District Court of Appeals, Hamilton County, Ohio which appeal was dismissed. Petitioner then appealed to the Supreme Court of Ohio where Petitioner filed a Memorandum in Support of Claimed Jurisdiction. The Supreme Court of Ohio, no motion to dismiss the appeal having been filed, sua sponte dismissed the appeal for the reason that no substantial constitutional question existed. The Supreme Court also overruled Petitioner's Motion For Leave

to Appeal from the Court of Appeals for Hamilton County, Ohio.

The State of Ohio has set April 19, 1977 as Petitioner's trial date.

The Court of Appeals, First Appellate District, Hamilton County, Ohio, on November 21, 1966 in *State v. Stark*, 9 O.A. 2d 42, considered an appeal from an order denying an application to take depositions of a witness in a criminal case. The appellate court acknowledged that, ordinarily, it would not be authorized to consider an appeal from an interlocutory order, but since the defendant claimed a violation of the State Constitution (Section 10, Article I) in that the Defendant was being deprived of a right of compulsory process to procure the attendance of witnesses in her behalf, the court found that the deprivation of that right, prior to trial, would constitute a final order.

Section 10, Article I of the Ohio Constitution, for the adoption of laws, providing for the taking of depositions in criminal cases provides as follows:

" . . . In any trial, in any court, the party accused should be allowed to appear and defend in person and with counsel; . . . to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf . . . ; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court . . ."
(emphasis added)

Amendment VI, Constitution of the United States provides,

" . . . in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

The right of the Sixth Amendment initially directed to federal criminal proceedings, is also a protection against state action and applicable through the Fourteenth Amendment. It is a right among those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions. It is basic to our system of jurisprudence, and is a fundamental right essential to fair trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.C. 1444, *Brookhart v. Janies*, 384 U.S. 1, 86 S.C. 1245.

The right to compulsory process is so fundamental that to require a defendant to go to trial without material witnesses' testimony, when the testimony would be available through the simple process of deposition, is essentially denying the right to a fair trial. It would be ludicrous to require a trial to go forward knowing that witnesses material to the defendant were not present, and knowing that the application having been denied, a merit appeal would be taken. It is equally ludicrous to assume because the Judge scratches out the words "final order", that this in any way changes the nature of the effect of the order upon the litigant. Petitioner properly raised constitutional questions so as to give this court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR GRANTING THE WRIT

The judicial application of the statutes of Ohio and their judicial interpretation as they relate to a defendant in a criminal case accused of a felony constitutes a denial of due process of law, equal protection of law and the more fundamental right to compulsory process. The courts in their decisions and in their actions below have acted unconstitutionally as the court said in *State v. Stark*, 9 O.A. 2d 42, 222 N.E. 2d 794, 796:

" . . . It has been repeatedly indicated that the court's authority to grant applications for depositions is subject to strict compliance with the limitations on the process

laid down by the legislature in the exercise of its constitutional authority. See *Neiswender v. State*, 26 O.Cir. Ct.R.N.S., 247, 35 Ohio Cir.Dec. 116 (Application deficient in its representations); *Yunker v. State*, 8 O.A. 157 (No pertinency to justice of the peace cases — testimony sought not material); and *State v. Anthoulis*, 62 O.A. 113, 23 N.E.2d 312 (Evidence of character, credibility and reputation not contemplated). The taking of testimony by interrogatory is nowhere contemplated in criminal proceedings."

Petitioner's case does not fail for any exception, as the trial judge found the witnesses whose depositions were sought to be taken to be "material witnesses." appendix A. Thus, the denial of Petitioner's Application to take depositions of out-of-state "material witnesses" is a denial of fundamental rights contained in the Ohio and Federal Constitutions.

CONCLUSION

The Petition raises substantial constitutional questions of great public interest and is within the reach of this court's certiorari jurisdiction. We respectfully urge that the writ for which the petitioner prays be issued.

Respectfully submitted,

JAMES R. RIMEDIO
RODGER N. WALK
Attorneys for Petitioner

APPENDIX A

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

CASE No. B-754151

STATE OF OHIO,

Plaintiff,

vs.

MARK COLE,

Defendant.

ENTRY

(Entered August 10, 1975)

The Applications of Defendant to take the Depositions of material out-of-state witnesses, Ronald Shrader and James Michael Webb in the above captioned matter being finally argued before the Court on June 28, 1976 are hereby denied.

/s/ MORRISSEY
Judge

2a

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-76637

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

ENTRY OF DISMISSAL.
(Entered October 25, 1976)

This cause came on to be heard by the Court upon the motion of the appellee, State of Ohio, for an order of this Court dismissing the appeal and upon the memorandum in opposition thereto, and

The Court, being fully advised in the premises, finds that said motion is well taken and that the same ought to be and is hereby granted.

Wherefore it is Ordered and Decreed that the appeal is dismissed.

It is further Ordered that a certified copy of this judgment shall constitute the mandate to the Common Pleas Court of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

3a

APPENDIX C

THE SUPREME COURT OF OHIO
1977 TERM

To wit: February 3, 1977

No. 76-1247

THE STATE OF OHIO,)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19...

..... Clerk

..... Deputy

APPENDIX D

**THE SUPREME COURT OF THE STATE OF OHIO
1977 TERM**

To wit: February 3, 1977

No. 76-1247

THE STATE OF OHIO,)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

**MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Hamilton County**

It is ordered by the Court that this motion is overruled.

COSTS:

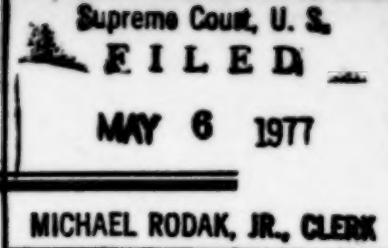
Motion Fee, \$20.00, paid by James R. Rimedio.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19...

..... Clerk

..... Deputy



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-1446

MARK A. COLE,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

**REPLY BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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IN THE
SUPREME COURT OF THE UNITED STATES
 OCTOBER TERM, 1976

NO. 76-1446

MARK A. COLE,

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STATE OF OHIO,

Respondent.

**REPLY BRIEF OF RESPONDENT IN OPPOSITION
 TO PETITION FOR WRIT OF CERTIORARI**

Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that petitioner is endeavoring to piece-meal appeal his case on a non-appealable procedural order of the trial Court which was determined not to be a final appealable order. It is also to be noted that petitioner has other avenues of recourse in these proceedings which he has not undertaken and has the ultimate right of preserving alleged error by way of an appeal if he is found guilty of the crime charged in the indictment.

OPINIONS BELOW

The Petition of the petitioners correctly cites the opinions below. However, because counsel did not show the Motion which was filed and granted by the Court of Appeals of the First Appellate District of Ohio, we are attaching same as our Appendix "A".

JURISDICTION

We do not believe that the jurisdiction requirements for this Court to accept jurisdiction have been met in this case.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257 (3). However, it is respondent's belief that petitioner has not even met the first two words in the particular section which are "FINAL JUDGMENTS".¹

This being an appeal from a preliminary Motion to Take Depositions prior to trial, we respectfully submit that this is not a final appealable order upon which jurisdiction of this Court can be invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

May a defendant directly appeal a pre-trial motion to take depositions when said pre-trial entry is not a final disposition of the case?

¹ 28 U.S.C. 1257 "FINAL JUDGMENTS or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . ." (Capitalization and underlining ours for emphasis.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution and 28 U.S.C. 1257 (3) and Ohio Revised Code 2945.50, 2945.53, 2505.02 and 2939.27 are set forth in Appendix "C" herein.

STATEMENT OF THE CASE

The Petitioner in this case was indicted for the crime of Possession of an Hallucinogen for Sale. No showing was ever presented to reflect that the witnesses could not be subpoenaed under the interstate witness compact. The Court overruled the Motion to take the depositions requested. The petitioner filed an appeal from that pre-trial entry of the Court to the Court of Appeals of the First Appellate District of Ohio. Respondent filed a Motion to Dismiss (see Appendix "A") because petitioner was endeavoring to appeal from a non-final pre-trial order of the trial court. The Court of Appeals granted the Motion to Dismiss. Petitioner then sought leave to appeal to the Ohio Supreme Court which was denied. A timely Notice of Appeal was filed by the petitioner in the Supreme Court of Ohio.

REASONS FOR DENYING WRIT

It is to be noted that this is an appeal from a pre-trial entry overruling a Motion to Take Depositions. There is a basic and fundamental principle of law in Ohio that an appeal can only be filed from a final order of the Court that resolves all matters between the parties. In this case the Court of Appeals of the First Appellate Dis-

trict of Ohio granted a Motion to Dismiss because the decision being appealed was not a final appealable order and did not resolve the issues between the parties. To have ruled otherwise would invite an inundation of piecemeal appeals to Appellate Courts by defendants from every pre-trial type of motion which was not dispositive of the issues before the Court.

Ohio Revised Code, Section 2505.02 (see Appendix "C") breaks down a final appealable order into two parts:

- (1) An order affecting a substantial right in an action;
- (2) Which order determines the action and is dispositive of said action.

As can be observed in this case; the order is not dispositive of the action. Conceivably counsel could issue an out-of-state subpoena for at least one of the witnesses under the Uniform Witness Act, of which Ohio is a party. However, even assuming that the petitioner cannot use said act in this case (petitioner never even applied for the issuance of a subpoena under this act) we still think that this is not a final appealable order upon which this Court should accept jurisdiction.

As this Court stated in the case of *Cox Broadcasting Corp. v. Cohn*, (1974) 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. (2d) 328 at page 338 of the Law Edition Text:

"Since 1789 Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a 'final judgment or decree'. Title 28 U.S.C. Sec. 1257 (28 U.S.C.S. Sec. 1257), retains this limitation on our own power to review cases coming from state courts."

This Court in setting forth certain exceptions to this general rule, which exception basically reflect that even if the decision is not final, if it is the final decision as to the specific question presented to the Court and if its determination will more or less moot further state proceedings and on special limited occasions this Court might accept jurisdiction.

The generalized exceptions, as set forth in the *Cox Broadcasting* case (ibid), are not applicable to this case for any one or all of the following reasons:

- (1) Petitioner has not sought the use of an out of state subpoena.
- (2) Petitioner has to go to trial to determine the general issue of materiality of the witness's testimony and whether his failure to obtain same was prejudicial.
- (3) Petitioner has to be found guilty. If acquitted, it moots the entire matter.
- (4) If convicted, petitioner has the right to raise by way of direct appeal the failure of the Court to grant him the right to take the depositions.
- (5) The parties to whom petitioner sought the right to take depositions of were temporarily out of the State (by way of military service) and conceivably could be in Ohio and subject to direct subpoena at this very moment.

As can be seen, the posture of the current case does not fall into any of the exceptions that this Court has carried out the general rule that it will not accept jurisdiction from a pre-trial entry which is not a final appealable order.

The Ohio Courts have determined in this case that the matter being appealed is not a final appealable order under Ohio law. In the orderly administration of justice, only final appealable orders should be considered. Otherwise, the appellate courts, who are already overburdened, would be inundated with piece-meal appeals from pre-trial motions.

The petitioner has lost nothing in light of the fact that if he is convicted he can preserve the alleged error by way of direct appeal from that conviction.

CONCLUSION

In conclusion, it is respectfully submitted that this Court should deny the writ of certiorari for any one or all of the following reasons:

- (1) Petitioner is endeavoring to appeal from a pre-trial motion which is not a final decision of the State Courts under Section 28 U.S.C. 1257.
- (2) Petitioner is endeavoring to appeal from a ruling on a pre-trial motion which the State Courts have ruled is not a final appealable order.
- (3) The Supreme Court should not interfere in orderly administration and procedural matters determined in the State Courts, especially where the petitioner's rights are not prejudiced thereby.
- (4) Petitioner's rights are protected by direct appeal if he is convicted of the basic crime.

Respectfully submitted,

SIMON L. LEIS, JR.

Prosecuting Attorney

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APPENDIX A

**COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**

NO. C 76637

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MARK A. COLE,
Defendant-Appellant.

MOTION TO DISMISS

Now comes the Plaintiff-Appellee in the above entitled matter and does hereby move this Court for an Order to Dismiss the Appeal in the above entitled matter for the reason that on the face of the pleadings as filed by the Defendant-Appellant in this Court the said Notice of Appeal is not well taken.

On the face of the pleadings the Defendant-Appellant states that he is appealing from an Order of the Court of Common Pleas of Hamilton County, Ohio, in denying his application to take depositions of material out-of-state witnesses which Order was entered on the 11th day of August, 1976. Without going into the merits of said Application to take depositions; which we feel to be irrelevant and im-

material to these proceedings, we respectfully submit that a denial of an Application to take depositions is not a final appealable order under the Rules of Appellate Procedure. Accordingly, said Plaintiff-Appellee does hereby move this Court for an Order to Dismiss the above entitled Appeal as not being from a final appealable order which is reflected on the face of pleadings of the said Defendant-Appellant.

Respectfully submitted,

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Prosecuting Attorney

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Assistant Prosecuting Attorney

420 Hamilton County Court House
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Attorneys for Plaintiff-Appellee

APPENDIX B

IN THE COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

NO. C-76637

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

ENTRY OF DISMISSAL

This cause came on to be heard by the Court upon the motion of the appellee, State of Ohio, for an order of this Court dismissing the appeal and upon the memorandum in opposition thereto, and

The Court, being fully advised in the premises, finds that said motion is well taken and that the same ought to be and is hereby granted.

Wherefore it is Ordered and Decreed that the appeal is dismissed.

It is further Ordered that a certified copy of this judgment shall constitute the mandate of the Common Pleas Court of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * to have compulsory process for obtaining witnesses in his favor, * * *.

OHIO CONSTITUTION

ARTICLE I, SECTION 10

§ 10 [Trial of accused persons and their rights; * * *
* * *, no person shall be held to answer for a capital, or otherwise infamous crime, * * *. In any trial, in any court, the party accused shall be allowed to * * * have compulsory process to procure the attendance of witnesses in his behalf, * * * but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. * * *

UNITED STATES CODE

§ 1257. State courts; appeal; certiorari

FINAL JUDGMENTS or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929. (Capitalization and underlining ours for emphasis.)

OHIO REVISED CODE

§ 2945.50 Deposition in criminal cases.

At any time after an issue of fact is joined upon an indictment, information, or an affidavit, the prosecution or the defendant may apply in writing to the court in which such indictment, information, or affidavit is pending for a commission to take the depositions of any witness.

The court or a judge thereof MAY grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecution or to the defendant, before such witness shall be examined. (Capitalization and underlining ours for emphasis.)

§ 2945.53 Right of accused to examine witness. * * *

In all cases in which depositions are taken by the state or the accused, to be used by or against the accused, as provided in sections 2945.50 to 2945.52, inclusive, of the Revised Code, the court shall by proper order provide and secure to the accused the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face, as fully and in the same manner as if in court. * * *

§ 2505.02 Final order. * * *

An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

* * *

§ 2939.27 Certificate to specify time witness will be required; mileage and fees. * * *

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in

a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. * * *